No. 00-1249

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

—v.—

CHICAGO PARK DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AND NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Morality in Media, Inc. and the National Law Center for Children and Families as *amici curiae*, file this brief in support of the Respondent in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.[1] The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of Morality in Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Robin S. Whitehead of Morality in Media, Inc. and Co-Counsel Bruce A. Taylor of the National Law Center for Children and Families and no part of the brief was authored by any attorney for a party. No person or entity other than these *amici* made any monetary contribution to the preparation or submission of this brief. Rule 37(6).

Morality in Media has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws regulating the distribution of obscenity. Morality in Media recognizes this case to be a major precedent not only in the area of parade and rally permits but also in licensing of sexually oriented businesses.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, No. 00-799 (2001); and *Ashcroft v. American Civil Liberties Union*, No. 00-1293 (2001).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and

dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (public nudity ordinance); *United States v. Playboy*, 529 U.S. 803 (2000)(cable-porn signal bleed); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001)(sexually oriented business licensing); and *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001)(virtual child pornography).

NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

Amici are filing this brief in support of the Respondent because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties or otherwise considered by the Court.

SUMMARY OF ARGUMENT

Rally permits are properly analyzed under *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Justice O'Connor in *FW/PBS* reduced the procedural safeguard concerning prompt judicial review as was previously required in *Freedman v. Maryland*, 380 U.S. 51 (1965). The *FW/PBS* Court distinguished licensing schemes from censorship schemes which require expedited review because those schemes involve regulations of speech where state officials had the ability to pass judgment on the content of speech. A permit ordinance for a rally if judged by *FW/PBS* standards need only provide for the "availability" of prompt judicial review.

Amici submit that a local permit or licensing ordinance cannot mandate that judicial review be completed within a certain time. This is so because a city or county council does not have the sovereign power to determine the jurisdiction of state trial courts or those above them and cannot set procedures for those courts that will hear appeals from the local government's administrative decisions. Local legislative bodies have no authority to order a state court to afford any particular degree of promptitude. *Amici* submit that prompt access to judicial review by a state court of general jurisdiction is what is required by *FW/PBS, Inc. v. City of Dallas*.

Finally, if the Honorable Court holds that *FW/PBS* requires a prompt judicial resolution, then the Court should announce a rule of procedural due process for the lower courts, setting a standard that is binding on the administration of the courts and requires the reviewing judges to dispose of appeals from local administrative decisions in a timely fashion. Such supervision of the administration of justice protects the rights of all the parties without striking local ordinances or requiring the enactment of new state statutes.

ARGUMENT

I. A PROMPT JUDICIAL RESOLUTION OF JUDICIAL CHALLENGES TO RALLY PERMIT DENIALS IS NOT REQUIRED BY *FW/PBS, INC. V. CITY OF DALLAS*.

An intentional prior restraint, in which government officials exercise substantial discretion to suppress speech they dislike, will be subjected to rigorous procedural requirements. *Freedman v. Maryland*, 380 U.S. 51 (1965). However, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court distinguished the procedural requirements for licensing sexually oriented businesses. *Amici* submit that *Freedman*'s safeguard, requiring that a censorship scheme assure a prompt final judicial decision was not required by *FW/PBS* for a licensing code, which must provide only for the "possibility of prompt judicial review," "an avenue for prompt judicial review," and "the availability of prompt judicial review." *Id.*, 493 U.S. at 228, 229, 230.

In *FW/PBS*, licensing codes were distinguished from censorship schemes requiring expedited review because censorial schemes involve regulations of speech that are "presumptively invalid." *Id.*, 493 U.S. at 229 (O'Connor, Justice). Most notably, those schemes involved intentional censorship, where state officials had the ability to pass judgment on the actual content of the speech. Such restrictions present a particular danger of permitting the suppression of speech by officials because they disapprove of the ideas expressed. The Court in *FW/PBS* distinguished the rule for licensing: "Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Amici agree with the Court of Appeals below in finding that the challenged rally permit regulation "does not authorize any judgment about the content of any speeches or other expressive activity--their dangerousness, offensiveness, immorality, and so forth." *Thomas v. Chicago Park District*, 227 F.3d 921, 924 (7th Cir. 2000). As such, the Seventh Circuit properly concluded that a mandate for a time limit on the judicial review was not warranted.

II. MERELY BECAUSE A RALLY SITUATION INVOLVES A PUBLIC FORUM DOES NOT REQUIRE THAT PRIOR FRAUDULENT REPRESENTATIONS IN APPLICATIONS BE OVERLOOKED

The Court below was correct in upholding the various grounds for denying a rally permit, specifically the regulation authorizing a denial where the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." *Thomas*, 227 F.3d at 925.

Support for this determination is found in the Fifth Circuit opinion in *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, at 1304 (5th Cir. 1988), where the Court of Appeals rejected a sexually oriented business's attack on the city ordinance provision that allowed denial of licenses to persons convicted of certain crimes. The Fifth Circuit recognized that this provision of the ordinance did not simply regulate the manner of protected activity, but rather denied the right of persons convicted of certain crimes to engage in the regulated businesses, holding that: "While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and evil sought to be prevented." *Id.* at 1305.

Amici submit that the mere fact a public forum exists in the instant case does not entitle a violator of past permit requirements to receive a rally permit.

III. A LOCAL LICENSING ORDINANCE CAN ONLY PROVIDE FOR THE AVAILABILITY OF PROMPT JUDICIAL REVIEW, IT CANNOT REQUIRE THAT REVIEW BE COMPLETED WITHIN A CERTAIN TIME

Cities and Counties can comply with this Court's statement of the need for speedy disposition of municipal or county administration of license applications and enforcement, with the possibility of prompt judicial review of those decisions, as stated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), by providing prompt procedural requirements in their ordinances to govern their internal administrative actions. The city and county councils can provide that an applicant or licensee can appeal a denial to the superior courts. Local legislative bodies cannot, however, dictate speedy resolution time limits within which the reviewing courts must dispose of their judicial review of the local government's decisions to grant, deny, suspend, or revoke a license.

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), a news vendor challenged the constitutionality of an Illinois ordinance governing the licensing of city newsstands. Under the ordinance, within a specified period after denial of a permit, an appeal to the commissioner of transportation could be made. There was no provision mandating that the judiciary review a decision on a permit. The Seventh Circuit, in holding that the procedural safeguards were sufficient despite the lack of any explicit provision requiring judicial review, found the availability of the state's common law writ of certiorari to provide an aggrieved party with an adequate means of judicial review. *Id.* at 1325.

In *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870 (Wis. App. 2000), *writ dismissed as moot after argument*, 121 S.Ct. 743 (2001), the Wisconsin Court of Appeals recognized the dilemma involved in a city's inability to dictate a speedy resolution and stated at 882:

> While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period.

See also *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) ("A municipality has no authority to control the period of time in which a state court will adjudicate a matter").

In *Books, Inc. v. Pottawattamie County*, 978 F.Supp. 1247 (S.D. Iowa, 1997) a district court also recognized this problem, stating at 1255, n. 7:

> There is no provision, however engineered, that allows a County to force a final determination by its state or federal courts. Such a provision would be beyond a county's power. It is not clear what, if anything, the *FW/PBS* Court meant by concluding the requirement of "prompt judicial review" in a municipal ordinance. This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.

Amici maintain that an untenable situation would arise if the courts hold that a final determination on the

merits is required in order to insure the availability of prompt judicial review of First Amendment considerations. In addition to the inability of municipalities to comply with such an interpretation, because they cannot order a state court to afford a prompt resolution, this problem is further complicated by the reality that the various States already have statutory mechanisms to provide judicial review of administrative determinations that do not provide for any specific degree of promptitude.

To avoid this dilemma, your *amici* suggest that the language on prompt judicial review in *FW/PBS* be found to mean prompt access to judicial review, rather than final judicial determination, as satisfying the requirement for prompt judicial review.

IV. THE SEVENTH CIRCUIT CORRECTLY HELD THAT RALLY PERMITS DO NOT INVOLVE CENSORSHIP SCHEMES

The Court of Appeals below found that the regulation at issue "does not authorize any judgment about the content of any speeches or other expressive activity-their dangerousness, offensiveness, immorality, and so forth." *Thomas*, 227 F.3d at 924. The Seventh Circuit distinguished this rally regulation, as being content-neutral, from sexually oriented business licensing, as being "quasi-censorship," as justification for holding that "a more relaxed attitude toward the pace of judicial review is warranted," in opposition to other court decisions that have required the "deadlining" of prompt judicial review. Specifically, the Court of Appeals stated at 927:

> They are based on Supreme Court cases involving censorship, such as the *Freedman* case cited earlier, or quasi-censorship, such as the ordinance at issue in *FW/PBS, Inc. v. City of*

> *Dallas*, *supra*, which required the licensing of such businesses. The government's evident concern with the content of the "speech" disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases, in which our rejection of deadlining in *Graff*, 9 F.3d at 1324-25, stands uncontradicted.

While *amici* reject the label of "quasi-censorship" for sexually oriented business license ordinances, we do agree that content regulation is not at issue in the case under consideration and that the procedural requirements of *Freedman* should be relaxed, even if it requires that a rally be held at another time or date so that an avenue to obtain judicial review may be followed.

The Court of Appeals in the instant case applied the constitutional framework set forth in *FW/PBS* and correctly held that the ordinance does not prevent prompt judicial review by state or federal courts, which is consistent with the plurality in *FW/PBS*, 493 U.S. at 227-28. The Seventh Circuit stated at 927:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction... Given that the plaintiffs have two remedies, one in state court and the other in federal court, the possible inadequacies of the state remedy, inadequacies in any event balanced by the

> expedition that barring oral testimony permits, are trivial.

See also *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d at 882, where the Wisconsin Court of Appeals held that "the City's ordinance will be upheld as long as expeditious judicial review is available."[2]

In *TK's Video Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), a pornography book and video store brought an action challenging the county's licensing requirements for "adult businesses." Under the statute, a rejected license applicant could seek review within thirty days before the order became final. The Court of Appeals for the Fifth Circuit upheld the ordinance's provisions regarding judicial review, stating at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some

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[2]Cases not mandating time limits for a decision include: *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) (finding the *FW/PBS* standards were met where denied applicant could file appeal pursuant to general Massachusetts procedures for informal review of agency decisions), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), in support of its interpretation. *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (finding requirement for expeditious judicial review satisfied where unsuccessful licensing applicant can immediately challenge the regulatory decision in court and request a TRO to prevent closing a business), and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). *See also O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990)(declining to apply *FW/PBS* safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

> uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), the Eleventh Circuit agreed with the First, Fifth, and Seventh Circuits in holding that this Court's requirement of the "possibility of" prompt judicial review is satisfied with access to judicial review. After reviewing the split in the Circuits, the Court of Appeals concluded at 1256:

> Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt judicial decision"...Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship.

Amici assert that it was not the intention in *FW/PBS* to require a prompt judicial decision in situations where municipalities provide for the type of judicial review allowable within their limited powers. For this Court to hold otherwise would be to invalidate municipal ordinances solely due to the time frames for that particular locale's judicial review procedures. This could lead to arbitrary and inconsistent decisions by the Circuit courts because of the different procedures of the various state court systems within their jurisdiction.

In *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the City successfully argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. This type of proceeding is a form of action that provides the relief that was previously obtained by writs of *certiorari*, *mandamus*, and prohibition. The District Court noted that neither Supreme Court nor Second Circuit case law had addressed whether an action brought pursuant to Article 78 is sufficient to satisfy the requirements noted in *FW/PBS*.

The *Gasparo* Court, in upholding the judicial review procedure as adequate, looked to the Seventh Circuit decision in *Graff v. City of Chicago*, *supra*, finding the statutory schemes to be virtually identical and agreed, stating, 16 F.Supp.2d at 212:

> ... a majority of judges in *Graff* concluded--though for different reasons--that the availability of a *certiorari* action constituted sufficiently prompt judicial review. The five judge plurality in *Graff* held that because an unsuccessful applicant for a permit could obtain judicial review through the common law writ of *certiorari* and could raise his constitutional claims through that mechanism, judicial review was available for the purposes of the First Amendment.

Your *amici* assert that the Seventh Circuit Court of Appeals, along with the First, Fifth, Seventh, and Eleventh Circuits, are correct in holding that the appropriate standard to be applied, with respect to judicial review of rally permit denials and sexually oriented business license denials, is that of access to prompt judicial review, not the additional requirement of a mandated judicial decision. A true

censorship scheme would still be subject to a prompt decision, as established by *Freedman v. Maryland*, 380 U.S. 51 (1965). Unlike censors, who pass judgment on the content of expression, licensing officials look at technical and ministerial facts in deciding whether to issue a license. *See FW/PBS*, 493 U.S. at 229. Thus, licensing decisions are different and *amici* agree with *Boss Capitol* where that court stated: "We believe this is a situation for 'treating unlike things differently according to their differences.'" *Id.* at 1256.

V. IF THIS COURT DETERMINES THAT PROMPT JUDICIAL RESOLUTION IS REQUIRED FOR RALLY PERMITS, THE QUESTION AS TO WHETHER IT IS ALSO REQUIRED IN SEXUALLY ORIENTED BUSINESS LICENSING SHOULD BE DISTINGUISHED

In *FW/PBS* this Court justified the more narrowly defined scope of procedural safeguards because the dangers of a censorship system were not present in the licensing code. The plurality explained that a licensing scheme does not require individuals to judge the content of the speech. Instead, "the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." 493 U.S. at 229 (O'Connor, Justice). *See also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("...permitting schemes like Raleigh's do not directly regulate content...They are a far cry from the censorship scheme present in *Freedman.*"), and *Ward v. County of Orange*, 217 F.3d 1350, 1355, (11th Cir. 2000) ("Once again, it is important to stress the differences between censorship schemes and licensing schemes--'the dangers of censorship are less threatening when it comes to licensing schemes.'")

Where a licensing code regulates both speech and non-speech elements alike, extraordinary procedural

protections are not warranted. This Court has allowed state governments greater latitude in regulating "speech plus conduct" than in regulating "pure speech." *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *quoted in FW/PBS*, 493 U.S. at 244. A sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.

Amici maintain that there is a distinction between censorship schemes that involve decisions based on the content of expression and sexually oriented business licensing codes, which involve substantial government interests, such as preserving the public welfare and preventing violations of public health and safety regulations. These substantial interests include: monitoring of businesses for violations of building codes; zoning and interior configuration requirements; monitoring employees for criminal sexual offenses; protecting minors from access to or employment in sexually oriented businesses; deterring infiltration of organized crime; and preventing recidivism by those convicted of sex-related crimes.

In holding that prompt judicial review means prompt "access" to judicial review, the First, Fifth, Seventh and Eleventh Circuits have given implicit recognition to the application of secondary effects analysis in the context of sexually oriented business licensing. By allowing municipalities to license nude exploitation and hard-core pornography businesses based on the general qualifications of an applicant, those courts recognize that local governments have a substantial interest in preventing crime and urban blight through the use of licensing laws. *See Boss Capital v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999) ("Licensing officials do not pass judgment 'on the content of any protected speech'; rather, they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.'")

The additional requirement of securing a prompt judicial decision is not imposed by *FW/PBS* and is unnecessary in the absence of direct prior restraint of speech. The distinction between prior restraint censorship and applicant licensing requires that municipalities must only provide prompt access to judicial review for rally permit and sexually oriented business license decisions.

Amici also submit that, even if the *Freedman* prompt judicial determination requirement is applicable to rally permits which involve political speech, this should not apply to sexually oriented businesses licensing, which involve speech of lower societal import and less constitutional protection. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Nude dancing is at the "outer perimeters of the First Amendment, though we view it as only marginally so.") As compared to *Connick v. Myers*, 461 U.S. 138 (1983) ("Speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.")

VI. If This Court Concludes that Prompt Judicial Review Mandates a Prompt Resolution, *Amici* Urge this Court to Implement a Rule of Procedural Due Process to Instruct Courts How to Hear and Dispose of These Appeals or Judicial Reviews in a Prompt and Expedited Manner

As noted above, if this Court determines that a prompt judicial decision is required to satisfy procedural safeguards for rally permits, and if this rule is not distinguished or excluded from licensing sexually oriented businesses, this decision will pose great problems for municipalities. *See Nightclubs, Inc. v. City of Paducah, supra.* It would be an untenable exercise of the supervisory powers of the Court to announce a judicially imposed rule of

procedure that cannot be accommodated by municipalities. A procedural rule should be directed to the courts hearing the judicial review, without striking the ordinance on its face.

In the event this Court determines that a specific time period is required, your *amici* submit that this Court can instruct the state and federal courts how they must proceed and could comply, so that municipal ordinances can be administered and reviewed expeditiously and as applied, without facial invalidation.

The most effective and least burdensome proposition would be for this Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines to be a reasonable time. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing existing laws to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the Customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their

forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was also followed in *Gasparo*, 16 F.Supp.2d at 210.

As a matter of constitutional law, this Court could instruct state courts to provide an assurance of procedural due process by hearing and disposing of these appeals or judicial reviews in a prompt and expedited manner. This Court could impose specific time limits such as sixty, ninety, or 120 days, if necessary, in order to guide the lower state courts. *Thirty-Seven Photographs*, *supra* at 373-74.

Amici assert that, as with the *Miranda* warnings, no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

In the First Amendment area, this Court also imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing, however, and every state and federal court and law enforcement official knows from this Court's decisions that a search warrant is required of them to provide such procedural due process. *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973). *See also New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986). *But see*, when the procedures are not properly followed, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures nor the Congress. Although the State could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution nor the decisions of this Court should or need require them to do so. Some state legislatures have elected to do so in light of the federal decisions holding municipal ordinances or state statues unconstitutional. *See Baby Tam v. City of Las Vegas*, 199 F.3d 1111, (9th Cir. 2000) (The State amended the Nevada Revised Statutes and the local court's rules of practice to specify prompt judicial resolution of claims of prior restraint). *See also*, *Cal. Code of Civ. P.* Sec. 1094.8 requiring a prompt judicial decision in cases alleging prior restraint of speech or expressive conduct, and *Tenn. Code Ann.* Sect. 7-51-1110(d) providing for prompt decision.

However, if the federal courts had judicially declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then state courts could have authoritatively construed existing statutes and ordinances and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without having had the federal courts enjoin or otherwise declare those state laws facially unconstitutional.

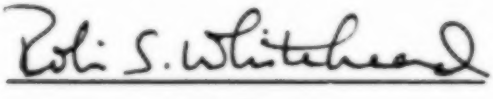
Without the Court's instruction as to the meaning of a prompt judicial determination, if that is what is held is to be required, questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for completion of review at both the trial and appellate levels, or is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the

reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video*, to require that "all judicial avenues be exhausted would be an oxymoron" 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *amici* pray that this Honorable Court affirm the judgment of the court below and declare the Chicago Park District's ordinance governing the issuance of permits for use of its parks as constitutional in that it properly provides for "a more relaxed attitude toward the pace of judicial review" as required by this Court in *FW/PBS, Inc. v. City of Dallas*.

Respectfully submitted,



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